IN THE SUPREME COURT OF FLORIDA

PEGGY ALLEN LUTTRELL ,

Petitioner,

v. Case No. SC08-1396

FLORIDA DEPARTMENT OF
HIGHWAY SAFETY AND
MOTOR VEHICLES,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

# PETITIONER'S INITIAL BRIEF ON THE MERITS

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## STATEMENT OF THE CASE AND FACTS

Petitioner's driving privilege was suspended for refusing a chemical test of her breath, blood, or urine.[1] (C-1) A formal review hearing was held October 17, 2006, before Hearing Officer Karen Dreggors. (B). The only contested issue at the hearing was the lawfulness of seizure.[2] Several documents were introduced into evidence, (C-1 through C-6), establishing the following facts: At approximately 2:56 a.m., Port Orange Police Officer Dale Harler observed a red Honda parked at a Wachovia Bank on Nova Road. (C-2). He pulled up to the Honda and saw that it was running and that its lights were on. (C-2). He made contact with Petitioner, the driver, who stated that she pulled into the parking lot to look for her glasses, which had fallen on the floor. (C-2). Officer Harler smelled alcohol and noted that Petitioner had slurred speech and glassy eyes. (C-2). Petitioner displayed clues of impairment on the field sobriety exercises. (C-2; C-3). Officer Harler arrested Petitioner for driving under the influence ("DUI"). (C-2). After receiving the implied consent warning, Petitioner refused to submit to a breath test. (C-2; C-4).

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[1] All references will be to Appendix to the Initial Brief on Merits.

[2] The lawfulness of the seizure/stop was an issue to be decided via the lawfulness of the arrest requirement in section 322.2615(7). The lawfulness of the stop was deleted from that section but in Department of Highway Safety and Motor Vehicles v. Pelham, 979 So.2d 304 (Fla. 5th DCA 2008), *rev.denied*, 984 So.2d 519 (Fla.2008) the Court held it was still an issue to be decided at the Formal Review.

Petitioner testified at the formal review hearing, (B 6-8), providing the following evidence: The bank was illuminated and had an operational ATM machine. (B 6). Shortly after Petitioner arrived at the bank parking lot, the officer pulled up behind her with his blue lights on. (B 6-7). The officer then approached her on foot as she was sitting in her car. (B 6-7). There were no posted "No Parking" signs in the parking lot. (B 7).

Petitioner moved to invalidate the suspension on the ground that the seizure was unlawful. (B 8-11). Specifically, Petitioner argued that the officer seized Petitioner without reasonable suspicion when he pulled behind her with his blue lights activated.[3] (B 8-10). On October 24, 2006, the hearing officer entered a Final Order of License Suspension, denying Petitioner's motion to invalidate. (A).

Petitioner filed a petition for writ of certiorari in the Circuit Court, challenging the Department's order. (D) The circuit court granted the petition, quashing the suspension order and directing the Department to remove the suspension. Luttrell v. DHSMV, 14 Fla. L. Weekly Supp. 822a (Fla. 7th Cir. June 15, 2007). On the seizure issue the Court found as follows:

[3] See Hrezo v. State, 780 So.2d 194 (Fla. 2d DCA 2001) (pulling behind parked car and activating "takedown lights," even though done solely for officer safety, constituted a seizure of driver of parked car, since reasonable person would not have felt free to leave when officer activated lights); Young v. State, 803 So.2d 880 (Fla. 5th DCA 2002) ("Florida courts consistently agree that an officer's use of his or her emergency lights evidences an investigatory stop rather than a consensual encounter.")

> Respondent asserts that the encounter was consensual. This assertion is erroneous. It is well-settled law that 'uncontroverted factual evidence cannot simply be rejected unless it is contrary to law, improbable, untrustworthy, unreasonable or contradictory.' *Gonzalez v. State*, 786 So.2d 559, 565 (Fla.2001). Here there was no documentary or testimonial evidence to contradict petitioner's statement that the officer used his 'take down' lights when he approached her. The hearing officer apparently rejected this testimony, but there is no finding that the uncontroverted factual evidence is contrary to law, improbable, untrustworthy, unreasonable or contradictory. The hearing officer was not free to simply ignore this testimony.

The Department petitioned the Fifth District Court of Appeal for a writ of certiorari, challenging the circuit court's opinion alleging it departed from the essential requirements of law. The Fifth District rejected this courts holding in Gonzalez v. State, 786 So.2d 559 (Fla.2001) and cited DHSMV v. Marshall, 848 So.2d 482 (Fla. 5th DCA 2003) and DHSMV v. Dean, 662 So.2d 371 (Fla. 5th DCA 1995) for the proposition that as the physical presence of the police officers is not required at these hearings[4], to require the hearing officer to accept unrebutted testimony from the licensee

[4] Section 322.2615(2) provides the law enforcement officer shall forward to the DHSMV the following which are "self-authenticating and shall be considered by the hearing officer"; an affidavit stating the grounds for belief that the person was driving under the influence, results of any breath, blood or urine test or an affidavit stating they refused same, officer's description of the person's field sobriety test. There is nothing in section 322.2615 that states the law enforcement officers are prohibited from attending the hearing if they so chose. Further, there is no limit to the amount of information the officer can include in the documents that are self-authenticating. Thus, if the legality of the seizure/stop, is an issue that is to be considered by the hearing officer, the officer is free to cover that issue in detail, generally or just not comment on it at all.

(or any other witness) "would eviscerate the statute." (referring to section 322.2615)

The Fifth District further said:

> "Luttrell argues, alternatively, that DHSMV's writ should be denied because Officer Harler's probable cause affidavit was insufficient to establish that his initial contact with Luttrell was a consensual encounter. We disagree. The probable cause affidavit reflects that Harler 'pulled up' to Luttrell's parked car and then made contact with her while she was sitting in the front seat of her vehicle. These facts, by themselves, would support a finding of a consensual encounter. The officer was not required to negate each and every possible act or circumstance that might transform a consensual encounter into an investigatory stop."

She timely filed a notice to invoke on or about July 15, 2008. (see Acknowledgment of New Case in Supreme Court)

## SUMMARY OF ARGUMENT

The district court of appeal applied the wrong law in granting the Department's certiorari petition. This Court has consistently held that uncontroverted factual evidence cannot simply be rejected unless it is contrary to law, improbable, untrustworthy, unreasonable, or contradictory. The evidence submitted by Ms. Luttrell at the formal review hearing was not contrary to law, was not improbable, was not untrustworthy or unreasonable and not contradictory and should have been accepted by the hearing officer. The Circuit Court applied the correct law when held there was no documentary or testimonial evidence to contradict her testimony that the officer's "take down" lights were on when he approached her and the hearing officer was not free to reject that testimony. The Fifth District's review was limited to a determination whether the circuit court afforded procedural due process and whether the circuit court applied the correct law. The Fifth District's opinion held that the hearing officer was free to disregard her testimony and was in error when it held the Circuit Court failed to apply the correct law.

## ARGUMENT

### THE DISTRICT COURT OF APPEAL FAILED TO APPLY THE CORRECT LAW IN QUASHING THE CIRCUIT COURT'S ORDER WHEN IT HELD THAT A FINDER OF FACT COULD DISREGARD UNCONTROVERTED FACTUAL EVIDENCE THAT IS NOT CONTRARY TO LAW, IMPROBABLE, UNTRUSTWORTHY, UNREASONABLE OR CONTRADICTORY

This Court first addressed the issue presented in this appeal in Brannen v. State, 94 Fla. 656, 114 So. 329 (1927). Brannen was charged with perjury in the criminal prosecution of Riley Douglas for unlawful carnal intercourse with an unmarried female person of previous chaste character, who was at the time of such intercourse under the age of 18 years. In his trial, the state introduced evidence tending to indicate that he had lied in his testimony during the prosecution of Riley Douglas. Specifically, Brannan testified, in the Douglas trial, that certain events happened on Easter Sunday, 1925. The State countered that with evidence that what he said he saw on that day would have been physically impossible. Later in the Douglas trial, Brannan was then allowed to retake the state and clarify his earlier testimony. The State did not introduce Brannan's later testimony in the Douglas trial in his perjury trial. In his own perjury trial, Brannan

acknowledged the earlier testimony in the Douglas trial but also testified that he later took the stand and clarified his earlier testimony. The court noted

> "It was neither charged nor proven by the state that the last-quoted testimony of the defendant was also false; in fact, the latter testimony was nowhere alluded to in the state's case, either in the indictment or proof. It was introduced in this cause by the defendant, in explanation and extenuation of his original testimony. The fact that this defendant, when testifying as a witness in the prosecution against Douglas, resumed the stand and gave the additional testimony last quoted, is evidenced in this case only by the oral testimony of the defendant himself; but his testimony to that effect is unassailed in this record, and is not controverted, disputed, or otherwise discredited"
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> 94 Fla. at 660; 114 So. at 430.

In reversing his conviction for perjury the court said:

> "Uncontroverted and undiscredited evidence is not necessarily always binding upon a court or jury, as, for instance, when it is essentially illegal, contrary to the natural laws, inherently improbable or unreasonable, opposed to common knowledge, in consistent with other circumstances established in evidence, or contradictory within itself. Ordinarily, however, and subject to certain well-defined exceptions (see 23 C.J. 47), such evidence, when material, properly admitted, and when it consists of facts (not opinions), cannot be wholly disregarded or arbitrarily rejected even though the witness giving it is an interested party. Montgomery v. State, 55 Fla. 97, 45 So. 879 (balance of citations omitted)
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> 94 Fla. at 661; 114 So. at 430-31.

In State v. Fernandez, 526 So.2d 192 (Fla. 3rd DCA 1988) the Third District followed Brannen, supra, saying

> "Although the trial judge purported to find the testimony of the officers at the motion to suppress 'not credible,' he was not free to do so. A court must accept evidence which, like the material testimony of the police officers, is neither impeached, discredited, controverted, contradictory with itself, or physically impossible. *Flowers v. State, 106 Fla. 686, 143 So. 612 (1932); Brannen v. State, 94 Fla. 656, 114 Fla. 429 (1927); Harris v. State, 104 So.2d 739 (Fla. 2d DCA 1958);* see *State v. Navarro, 464 So.2d 137 (Fla. 3d DCA 1984)."*

This Court cited Brannen in Walls v. State, 641 So.2d 381 (Fla.1994). Walls argued that the trial judge improperly rejected certain expert testimony in the penalty phase of his capital trial. This Court said

> "In Florida as in many states, a distinction exists between factual evidence or testimony, and opinion testimony. As a general rule, uncontroverted factual evidence cannot simply be rejected unless it is contrary to law, improbable, untrustworthy, unreasonable, or contradictory. *E.g., Brannen v. State,* 94 Fla. 656, 114 So. 429 (1927). This rule applies equally to the penalty phase of a capital trial. *Hardwick,* 521 So.2d at 1076.
>
> Opinion testimony, on the other hand, is not subject to the same rule. *Brannen."*

This Court quoted the above language in Gonzalez v. State, 786 So.2d 559, 565 (Fla.2001).

Other District Courts of Appeal are in accord with this Court. State v. Bowden, 538 So.2d 83, 85 (Fla. 2nd DCA 1989) ("A trial judge must accept evidence which is 'neither impeached, discredited, controverted, contradictory within itself, or physically impossible.'"); Fernandez, supra.

There is nothing about this statutory scheme that would require a rule of law different that what this Court has held in Gonzalez, et al. Even if there was, the Fifth District does not have the authority to change existing law as set forth in Florida Supreme Court Opinions. Hoffman v. Jones, 280 So.2d 431 (Fla.1973); State v. Lott, 286 So.2d 565 (Fla.1973).

Nothwithstanding the lack of authority to change exiting Florida Supreme Court precedent, the justification given by the Fifth District, "To accept the position that a hearing officer was required to accept the unrebutted testimony of a licensee (or any other witness) would eviscerate the statute." is simply unsupported by any evidence, data or legal theory. Eviscerate is defined as "to deprive of vital content or force." Webster's Ninth New Collegiate Dictionary, 1983; "to deprive of vital or essential parts." Webster's School & Office Dictionary, 1995. The Fifth District said this statutory scheme is designed to avoid requiring the physical presence of the arresting officer at the hearing. The question then presented would be "then if a hearing officer is required to accept the testimony of a licensee where that testimony if unrebutted, etc., how then would that eviscerate the statute?" I suppose the logic of the Fifth District is that if the licensee comes to the hearing and testifies to something different than the officer has written in his report or something in addition to what is in the report then the officer

would be required to come to the hearing to testify. That is simply not the case and makes no sense.

This statutory scheme has been in effect since October 1990. The legal issues to be decided by the hearing officer at the hearing in Luttrell's case have been in section 322.2615 since 1990. The legality of the stop/seizure has been a legal issue at formal review hearings since at least 1992. See Department of Highway Safety and Motor Vehicles v. DeShong, 603 So. 2d 1349, 1351 (Fla. 2d DCA 1992)("Apparently, the statute contemplates that issues relating to the lawfulness of the stop and any potential right to suppress evidence will be resolved under the second issue concerning the lawfulness of the arrest"); see also e.g. Department of Highway Safety and Motor Vehicles v. Thompson, 622 So. 2d 1169 (Fla. 5th DCA 1993). Thus it can hardly be argued that any police officer in the State of Florida is not aware of the issues to be decided; that they are not required to attend the hearing; that if they intend for any factual information be considered by the hearing officer that it should be contained in their probable cause affidavit.

The Fifth District said "The officer was not required to negate each and every possible act or circumstance that might transform a consensual encounter into an investigatory stop." What the officer is required to do is

provide the hearing officer with all the factual information that he/she wishes the hearing officer to consider on any potential issue provided for in the statute or authorized by appellate decisions.[5] The officer is also required to be factually consistent in their reports. Department of Highway Safety and Motor Vehicles v. Trimble, 821 So.2d 1084 (Fla. 1st DCA 2002) (In certiorari proceeding to review suspension of driver's license, circuit court did not impermissibly reweight evidence in concluding that competent, substantial evidence did not support hearing officer's finding that motorist was first given implied consent warning before she refused to submit to breath, urine or blood test after arrest for driving under the influence (DUI); arresting officer's affidavit of refusal, printout from breath test machine, and officer's alcohol influence report each gave different time for motorist's refusal to take test). Finally, the officer is required to submit enough factual information to the hearing officer to make a determination of exactly what test the licensee refused. State, Department of Highway Safety and Motor Vehicles v. Clark, 974 So.2d 416 (Fla. 4th DCA 2007) (driver's license could not be suspended under implied consent law after driver refused to submit to breath test to determine blood alcohol content where law enforcement officer gave driver implied consent warnings that erroneously informed

[5] Another example of an issue not contained in the statute but must be considered is whether a licensee has recanted an earlier refusal to submit to chemical testing. Larmer v. Dep't of Highway Safety and Motor Vehicles, 522 So.2d 941 (Fla. 4th DCA 1988)

driver that he driving privileges would be suspended if she refused to submit to a breath, blood, or urine test, when statute only authorized a breath test)

Thus, to say the law enforcement officer is not required "to negate each and every possible act or circumstance that might transform a consensual encounter into an investigatory stop" is likely true. But, if the law enforcement officer wishes to provide sufficient factual information to the hearing officer to make a complete review of the facts leading to the stop he/she must provide factual information on the contested legal issue. Here the Fifth District has said

> "The probable cause affidavit reflects that Harler 'pulled up' to Luttrell's parked car and then made contact with her while she was sitting in the front seat of her vehicle. These facts, by themselves, would support a finding of a consensual encounter."

This is absolutely and incorrect statement of law. The critical issue in making the determination of whether there is a consensual encounter or an investigatory stop is HOW the officer pulled up to the subject. Hrezo v. State, 780 So.2d 194 (Fla. 2d DCA 2001) (pulling behind parked car and activating "takedown lights," even though done solely for officer safety, constituted a seizure of driver of parked car, since reasonable person would not have felt free to leave when officer activated lights); Young v. State, 803 So.2d 880 (Fla. 5th DCA 2002) ("Florida courts consistently agree that an

officer's use of his or her emergency lights evidences an investigatory stop rather than a consensual encounter." Again the Fifth District has failed to apply the correct law.

Accordingly, the circuit court properly determined in its well-reasoned opinion that there was no lawful basis for the vehicle stop based, in part, on the testimony of the licensee. In reviewing the circuit court's opinion, the district court's scope of review was limited to determining whether the circuit court afforded procedural due process and whether it applied the correct law. Haines City Community Development v. Heggs, 658 So. 2d 523, 530 (Fla. 1995); Educ. Dev. Ctr., Inc. v. City of W. Palm Beach Zoning Bd. of Appeals, 541 so.2d 106, 108 (Fla.1989). "The appellate court does not consider CSE." Department of Highway Safety and Motor Vehicles v. Trimble, 821 So.2d 1084, 1086 (Fla. 1st DCA 2002)

Here, the circuit court applied the correct law. It relied primarily on Gonzalez, supra. Accordingly, there was no miscarriage of justice to justify the district court's issuance of a writ of certiorari. Educ. Dev. Ctr., Inc., supra; City of Deerfield Beach v. Vaillant, 419 So.2d 624 (Fla.1982).

In summary, the district court of appeal applied the incorrect law. The decision of the district court should be quashed and the circuit court's ruling reinstated.

## CONCLUSION

Since 1908 this Court has said that uncontroverted and undiscredited evidence, subject to certain limitations none of which apply here, when material, properly admitted and when it consists of facts (not opinions), cannot be wholly disregarded or arbitrarily rejected even where the witness is an interested party. The Circuit Court followed that law. The Fifth District disregarded existing law and carved out an exception. They did not have that authority and thus, exceeded their certiorari jurisdiction.

BASED ON THE foregoing argument and authority, Petitioner respectfully requests that this Honorable Court quash the decision of the Fifth District Court of Appeal and reinstate the order of the circuit court.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to Heather Rose Cramer, Esq., Assistant General Counsel, DHSMV, Lake Worth Legal Office, P. O. Box 540609 , Lake Worth, FL 33454-0609, this 7th day of January, 2009.

_____
COUNSEL FOR PETITIONER

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the font used in this pleading is 14-point Times New Roman.

_____
COUNSEL FOR PETITIONER